No. 9153

United States Circuit Court of Appeals

For the Ninth Circuit

ROSE PACKARD SHYVERS,
Appellant,

vs.

THE SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
Appellee.

Appellant's Opening Brief

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

RAYMOND R. HAILS and
JOHN A. JORGENSON,
1321 Park Central Bldg.,
Los Angeles, California,
Attorneys for Appellant.

INDEPENDENT-REVIEW, LAW PRINTERS, LOS ANGELES, CALIF.

INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Statement of the Pleadings and Facts Disclosing Jurisdiction

This is a proceeding under Section 75 of the Federal Bankruptcy Act Relating to Agricultural Compositions and Extensions.

On October 17, 1938, Appellant filed with the United States District Court at Los Angeles a "Debtor's Petition in the Proceedings Under Section 75 of the Bankruptcy

Act" through her attorney in fact, Raymond R. Hails. In it said attorney in fact represented that the Debtor was a resident of England and was absent there, and he executed and filed the petition in her behalf on that account, and that he was familiar with Debtor's assets and liabilities in the United States, and to it were attached the usual bankruptcy schedules. In this petition said attorney in fact represented that he was forwarding to England a similar petition and schedules for execution by the Debtor there, in order that she might execute the petition and schedules personally and also set forth her properties outside the United States, and that as soon as said petitions and schedules were returned by the Debtor, they would be filed with the Clerk also. The supplemental and amendatory debtor's petition and schedules were filed with the Clerk November 18, 1938. (Record, pp. 11 to 27.)

Pursuant to such petitions the District Court made its "Approval of Debtor's Petition and Order of Reference" (Record, pp. 10-11) under which Debtor's petition was approved and the matter assigned to John Frame, one of the Conciliation Commissioners in Bankruptcy of said Court, to take further proceedings therein as required by the Act.

On January 6, 1939, Appellee served and filed notice that on January 23, 1939, it would move for a dismissal of said proceedings, upon the following ground: "That Debtor, Rose Packard Shyvers, is not personally *bona fide* engaged primarily in farming operations and that the principal part of her income is not derived from farming operations within the purview of Section 75, Subdivision (r) of the Bank-

ruptcy Act; that, therefore, the Court has no jurisdiction of this proceeding." At the same time the Court made an Order referring said motion to said Conciliation Commissioner to take evidence in support of and against the same and, after the taking of such evidence, to file his Findings and Report therein so that the hearing might be held on January 23. (Record, pp. 27-29.) Upon the hearing of the Motion the Court sustained the contention of Appellee and dismissed the proceedings. (Record, pp. 30-32.)

Section 75 (n) provides, among other things:

> "In proceedings under this Section, except as otherwise provided herein, the jurisdiction and powers of the Courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the Appellate Courts, shall be the same as if a voluntary petition for adjudication had been filed and a Decree of Adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the Clerk of Court or left with the Conciliation Commissioner for the purpose of forwarding same to the Clerk of Court."
>
> "The Circuit Courts of Appeals of the United States, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with the appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or

reverse, both in matters of law and in matters of fact". (Section 24 (a) Federal Bankruptcy Act.)

Concise Statement of the Case Showing Questions Raised

It should be observed that Appellee made its motion upon the sole ground that the Debtor was not personally *bona fide* engaged primarily in farming operations and that the principal part of her income was not derived from farming operations within the purview of Section 75 (r) of the Bankruptcy Act and that, therefore, the Court had no jurisdiction of such proceedings. In connection with said Notice of Motion, respondent bank set forth as its "Points and Authorities" the following: "A Debtor who does not engage personally in the raising of products of the soil, does not live upon the land involved in the proceeding, and carries on no operation as enumerated in said sub-section (r) of Section 75 of the Bankruptcy Act, personally, is not a farmer within the meaning of said sub-section (r) of Section 75 of the Bankruptcy Act and under said circumstances the Court has no jurisdiction under Section 75 of the Bankruptcy Act." In support of said points, in addition to said sub-section (r), it cited as sole authorities: *In re Olson,* 21 F. Sup. 504; and *In re Davis,* 22 F. Sup. 12. (Record, pp. 27-29.) The inquiry in the lower court, therefore, was limited to the specific grounds stated in such Notice of Motion.

Pursuant to the filing of the Petition and the Order of Reference thereon, the Conciliation Commissioner called a

meeting of the creditors at his office in Santa Barbara, California, for December 14, 1938. At that time Appellee appeared by an agent, H. W. Hart and its attorney, Roane Thorpe, Esquire, and Debtor appeared by her attorneys, Messrs. Hails and Jorgenson. Counsel for the bank filed with the Commissioner a sworn statement of its claim showing that at the time of the commencement of these proceedings there was due the bank from Debtor and in default a total sum of approximately Two Hundred Thousand Dollars ($200,000) represented largely by two promissory notes secured by two deeds of trust covering the ranch property hereinafter described. Upon the filing of said claim a discussion ensued between counsel for the Debtor, representatives of the bank, and the Concilation Commissioner in reference to agreeing upon some definite extension of time. Counsel for the bank stated that he could not consent to any definite extension without consulting his client and for the purpose of affording such an opportunity and further discussion between such counsel and counsel for Debtor, further proceedings before the Conciliation Commissioner were continued by Stipulation and Consent to January 11, 1939.

In the meantime Appellee filed and served its Notice of Motion aforesaid, and at said continued hearing on January 11, 1939, no further proceedings were had except the taking of the testimony of Raymond R. Hails, attorney in fact for Debtor, and Henry McGee, agent of the Debtor. The Commissioner thereupon caused the reporter to transcribe the proceedings had at both of said meetings and for-

ward same to the Court pursuant to the Order of Reference in relation to the Motion, and such transcripts were before the Court on the hearing of said Motion to Dismiss. No further proceedings have been had before or taken by said Commissioner. (Record, pp. 32-34.)

It may be said, since Appellee relies solely upon Debtor's petitions and testimony by her agents, that there is no conflict in the evidence. The stipulated "Narrative of Evidence" contains the following statement (just below the middle of Record, p. 40): "Her principal income, in fact practically all of it, is derived from this ranch, and the foregoing operations." This statement, in conjunction with the "Points and Authorities" submitted by Appellee on its motion, shows conclusively, as the fact is, that Appellee relied in the lower Court, and must rely here, solely upon the proposition that Debtor does not come within the purview of the Act because, as Appellee states in such "Points and Authorities," she "does not engage *personally* in the raising of products of the soil, does not live upon the land involved in the proceeding, and carries on no operation (*personally*) as enumerated in said sub-section (r) . . ." (Emphasis and the word "personally" in parentheses supplied.) In other words Appellee claims that, though Debtor derives her principal income, in fact practically all of it, from products of the soil, produced on her farm through cash and crop rentals from tenants superintended by her manager, she does not come within the purview of the Act because she does not live on the land and does not herself personally plough and cultivate it, plant it to crops, and harvest it.

Specification by Number of Assigned Errors Relied Upon

Only one assignment of error is made. It appears on page 44 of the record and is set forth in full *infra.*

Argument

ASSIGNMENT OF ERROR: *The Court erred in granting the Motion of Security-First National Bank of Los Angeles for dismissal of this proceeding upon the alleged ground that Debtor is not a farmer within the purview of Section 75 of the Bankruptcy Act and that, therefore, this Court has no jurisdiction of this proceeding; and the Court erred in ordering in connection with the granting of said Motion the dismissal of this proceeding; Debtor claiming that the record effectually shows the Debtor is such farmer and that the Court does have jurisdiction.*

The parties reduced the evidence taken before the Conciliation Commissioner to narrative form and stipulated to its correctness. (Record, pp. 34 through 41.) In addition to such narrative there was before the Court such evidence as is furnished by the two verified Debtor's petitions. (Record, pp. 3-27.)

The petitions and schedules show, so far as relevant here, that Debtor resides at 36 A Kensington Park Road of Notting Hill Gate (street, city) London, W. 11 (in the County of..... and District and State of England). Debtor alleges that she is primarily *bona fide* personally engaged in producing products of the soil or that the principal

part of her income is derived from farming operations as follows: That the principal part of her income is derived from cash rentals and the proceeds from the sale of crop share rentals derived from the so-called Packard Ranch more particularly described in Schedule B (1); that such operations occur in the County of Santa Barbara; that she is insolvent or unable to meet her debts as they mature and that she desires to effect a composition or extension of time to pay her debts under Section 75 of the Bankruptcy Act. It appears from the schedules that she owes about $255,-000.00 of which approximately $200,000.00 is due Appellee, secured by trust deeds on the Packard Ranch consisting of 9300 acres in Santa Barbara County, California. Of the balance about $3,400.00 are taxes constituting a lien upon said ranch; $40,000.00 secured by what she describes as "real farm property" in England; and about $12,000.00 is unsecured. The total value of Debtor's assets is alleged to be approximately $370,000.00 of which the Packard Ranch is $284,000.00, "real farm property" in England $70,000.00, a lot in Santa Barbara $1,500.00, and personal property approximately $3,000.00.

The following, taken from pages 34 through 41 of the record is the

"Narrative of Evidence

"The transcripts of testimony taken before John Frame, Conciliation Commissioner, pursuant to the Order of Reference aforesaid, show that witnesses testified to the following facts (set out in this paragraph):

"Petitioner is a resident of England; Raymond R. Hails is her attorney in fact; he obtained the first power in 1929 or 1930 and a second one in 1932. He has been acting as her representative in this country under such powers. One Francis Price had preceded him as attorney in fact for petitioner. The ranch consists of approximately 9300 acres; approximately 650 to 750 acres are river-bottom land, most of which is under irrigation and the principal products from that portion of the ranch consist of alfalfa, sugar beets, mustard, beans, onions, some hay, but not much, and some grain. There are about 700 acres of what is called ocean front, land which slopes back from the ocean up to the mesa which is used part of the time for pasturage for a dairy, part of the time for raising hay and some smaller quantities of crops are grown thereon. There are approximately 200 or 300 acres of what is known as bench land which slopes back from the bottom-lands up to the mesa. This is mainly used for raising hay and for stock pasturage. In two canyons on the easterly end of the ranch there is a section of fifty acres of good farm land, not irrigated, on which beans, mustard and other crops are raised. There are other scattered parcels of bottom lands and bench lands which are farmed from time to time but not regularly. On the mesa there are perhaps three or four thousand acres of fairly level land in grasses which are used for pasturage only. The balance of the ranch is used for

pasturage but is somewhat brush-covered, some parts quite heavily. The 650 or 700 acres of bottom-lands are customarily leased to two or three different tenants on a crop share basis. The tenant is required, except in the case of beets, to deliver [47] the owner's share to a local warehouse but in the case of beets all are delivered to a beet dump of some sugar beet company which pays the tenant and owner separately. Mr. McGee attends to selling the petitioner's share and the proceeds are turned over to Mr. Hails. The alfalfa and grazing lands are rented on a cash basis and the proceeds are turned over by the tenants to Mr. McGee and by him to Mr. Hails. Two dairies are operated on the property, one by Singorelli Brothers at the easterly end of the ranch and their lease includes most of the mesa grazing lands and the alfalfa lands. Their lease includes some crop land which is not included in the cash rental. The other dairy is operated by a man named Dettamanti on the ocean front and he pays a cash rental. Mr. Hails deposits the monies received to petitioner's account. This ranch was originally owned by Albert Packard, father of petitioner. On his death, many years ago, it passed to his children who were petitioner, her brother, Will Packard, and three sisters, and thereupon Will Packard operated the ranch for the heirs up until his death in 1920 or 1921. During this period, after her father's death, petitioner purchased the interests of the other heirs and became the sole owner which she has been ever since. Will Packard resided on the ranch from 1892 to 1898 when he moved to the nearby town of Lompoc. Again he resided on the ranch between 1913 and 1916. When petitioner acquired the ranch in 1921 or 1922, she was making her home in England where she resided with

her husband. Every year since then she has come over to this country up to 1933. She stayed here from four to seven months each time, and, while here, she spent most of her time on the ranch. She had trees planted, irrigation wells dug, concrete lines laid, and was experimenting with different crops like artichokes, tobacco, asparagus, beans, beets, onions, and grain. She had windmills and buildings and outhouses repaired. McGee went on the ranch in 1916. He was a brother-in-law of Will Packard. Packard was farming the [48] part of the ranch that was under cultivation. McGee was his foreman, and they employed from twelve to fourteen men, and continued to farm in that way until December 1919, when Will Packard died. An administrator was appointed of his estate and said administrator appointed McGee manager of said ranch. At that time they leased to Union Sugar Company all the flat land planted to beets. They harvested the hay, hired the men, and sold it. After about July 1, 1920, they leased the beach front and all the mesa for a dairy and in 1921, when petitioner became the owner, she leased the bottom land to three different tenants and from that time to the present all the land has been leased to various tenants McGee lived on the ranch from 1916 to 1924 when he moved into Lompoc which is situated about 8 miles from the ranch and he has resided in Lompoc ever since. There are five different sets of buildings on the property an average of one mile apart. Since petitioner became the owner these buildings have been occupied by tenants or help. McGee has been resident manager for petitioner ever since she became the owner and still is. When petitioner came to this country her activity all centered about the ranch. She instructed McGee what was wanted done, and he fol-

lowed her instructions. McGee picks out the tenants; he takes the matter up with Hails who draws the leases. He looks out for erosion on the river and sees to it that the farms hold the moisture by continuous cultivation before the crops are planted, and certain portions of the land are selected by him on which to plant beets or mustard. When the crop is planted and begins to grow, he sees to it that the weeds are kept down; sees to it that the beets are irrigated at the proper time. Proper irrigation is one of the most important things about a beet crop. Three or four days' delay in irrigation makes a big difference. He sees to it that the outhouses, barns, corrals, and fences are kept in repair and everything kept clean. When the crop is harvested, he sees to it that petitioner gets her proper share, not merely [49] in quantity, but quality. He sees to it that the crops are properly thrashed. The crops are hauled to a public warehouse and there cleaned, and he looks after that, and there petitioner's portion is set aside. He looks after the marketing of petitioner's share. He may let her share of the crops lie there a week or several weeks or months, and, when he thinks the price is right, he disposes of it. He watches the markets closely. McGee devotes his whole time to this job. The tenants obey his instructions and the leases provide they shall; he keeps in touch with petitioner in England, by letter, as to what is going on when she is absent. McGee attends to making all arrangements with the government under agricultural laws. Petitioner owns the surface pipe used for irrigation and McGee sees to the proper distribution of the water among the tenants. He has never been in England and does not know of his own knowledge whether petitioner lives on a farm there. The gross production, in dollars, from the ranch

from the foregoing operations since 1924, and the share received by petitioner, is as follows:

Year	Gross Production	Petitioner's Share
1924	$68,112.50	$20,223.50
1925	49,460.65	15,599.41
1926	49,109.59	17,133.20
1927	55,292.87	16,407.63
1928	103,924.25	20,490.13
1929	35,403.85	13,260.10
1930	50,967.38	11,662.03
1931	43,968.25	15,170.13
1932	26,729.27	5,573.47
1933	16,204.28	6,422.58
1934	21,669.01	6,637.58
1935	15,109.48	6,003.88
1936	13,861.78	5,764.32

In 1937 petitioner's gross income as her share from the land, amounted to $8,944.62, which included $2,301.75 oil rental. In 1938 petitioner's gross income from her share was $6,370.27, but there are approximately $500 worth of crops belonging to her on the land not yet disposed of from that year. The taxes on the land have averaged around $3,000 during the past six years, and for 1938-39 are approximately $3,250. Mr. McGee, as resident [50] agent and superintendent has been receiving $1800 a year as salary. The average expense for repairs is around $150; the interest on the indebtedness to respondent bank is approximately $10,000 per annum; insurance on the buildings amounts to about $50 per annum and McGee's traveling expenses about $50 a year. Hails has never received any salary. Petitioner has no other occupation than that of housewife. Her real estate in

England is farm property. Hails has not discussed the situation with Debtor and it is merely hearsay. Her husband's principal occupation is ship-broker and builder in London. She has not been in the United States since early in 1933. Her principal income, in fact practically all of it, is derived from this ranch, and the foregoing operations. Mr. Hails as attorney in fact for Debtor does not operate or farm any of the Packard Ranch himself. Prior to 1932 Rose Packard Shyvers spent a great deal of time and activity in directing the ranch and investigating and experimenting with new crops. Since 1932, however, she has not been on the ranch herself, and, in fact, has been in England, where she had been making her permanent home since about 1922, and the ranch has been run by Mr. Hails and Mr. McGee. The whole ranch has been farmed by tenants on either a cash rental basis or on a crop share basis since 1921, and, in addition, there are two dairies located on the ranch which pay a cash rental and also pay a crop share rental on crops they raise. Mr. McGee left the ranch in 1924 and has resided in Lompoc since that time. Mr. McGee has not heard from Rose Packard Shyvers for about six months. His duties as superintendent consist, among other things, of picking out the tenants and discussing them with Mr. Hails, who holds a power of attorney from Rose Packard Shyvers, and who draws the leases. There was no income from oil rentals in 1938, and no part of the ranch is producing any income from oil at the present time. Debtor has no income from property other than this ranch, in the United States. Debtor insisted at the hearing before Commissioner Frame aforesaid, and again [51] at the hearing of said motion before Judge James that, if the burden of proving

Debtor was a farmer within the purview of the act, was on Debtor, a postponement should be had to take Debtor's deposition in England. Counsel for said Bank stated that such burden was on them.

"Stipulation

It is hereby stipulated and agreed that the foregoing narrative of proceedings had before Conciliation Commissioner Frame is a true and correct statement of such proceedings and a true narrative of the evidence offered and received."

The District Court apparently dismissed the proceedings upon the sole ground that petitioner is not "personally" primarily engaged in farming, and ignores the statutory alternative of deriving the principal part of her income from the specified operations. That the latter is an alternative is clearly recognized by the 9th Circuit Court of Appeals (*In re Moser,* decided April 13, 1938, 95 F. 2nd 944), and by the Supreme Court (*First Nat'l v. Beach,* 301 U. S. 435, 57 S. Ct. 801, 81 L. Ed. 1206). And as to whether petitioner comes under the first half of the definition, respondent relies solely upon *In re Olson,* 21 F. Sup. 504, and *In re Davis,* 22 F. Sup. 12, decided by the same District Judge in Iowa; while we have, in addition to the two cases mentioned heretofore, *In re Wright's Estate,* 17 F. Sup. 908, (D. C. Louisiana,) and *In re Shonkwiler,* 17 F. Sup. 697 (D. C. Illinois), to the contrary.

The Bankruptcy Act expressly provides that Courts have power to adjudge bankrupts person "who do not have their

principal place of business, reside, or have their domicile *within the United States,* but have property within their jurisdictions." (Sec. 2a (1)).

Sec. 75 (r) defines "farmer" as including "not only an individual who is *primarily bona fide personally engaged* in producing products of the soil but also any individual who is *primarily bona fide personally* engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the *principal part of whose income* is derived *from any one or more of the foregoing operations* . . . , and a farmer shall be deemed a resident of any county in which such operations occur."

If the italicized words "from any one or more of the foregoing operations" relate back to and include the specified operations by one "primarily *bona fide* personally engaged" therein, then the second half of the definition relating to the words "principal part of whose income" becomes meaningless. For such a person so deriving the principal part of his income would already be under the first half covering one who is "primarily *bona fide* personally engaged" in such operations. Besides the last phrase reciting that "a farmer shall be deemed a resident of any county in which such operations occur" contemplates his actual residence elsewhere than on the farm.

In the *Moser* and *First National v. Beach* cases *(supra),* the 9th C. C. A., and the Supreme Court did not segregate and weigh the amount of income derived by the debtor from his *personal* operations against that derived from

leasing. Their relative amount was deemed immaterial. Hence, the words "principal part of whose income" does not relate back to the farmer's *personal* operations.

The construction, contended for by respondent Bank, is thus rejected in the words of Mr. Justice Cardozo (*First Nat. Bank v. Beach, supra*):

> "Was respondent a farmer because 'personally *bona fide* engaged primarily in farming operations,' or because 'the principal part of his income was derived from farming operations'? We do not try to fix the meaning of either of the two branches of this definition, considered in the abstract. The two are not equivalents. They were used by way of contrast. Occasions must have been in view when the receipt of income derived from farming operations would make a farmer out of some one who personally or primarily was engaged in different activities."

But aside from these authorities, let us consider the matter from another standpoint. If a farmer lives on his land and does all the work himself, he certainly is "primarily *bone fide* personally engaged" in the production specified. Suppose, however, that he does not do all the work himself, but hires help. Is he any less a "farmer" within the definition? Suppose he does none of the work himself, but hires servants to do it all, and merely superintends the operations. Does he lose his status as "personally engaged"? If not, just where is the difference between one who conducts such operations thru servants and one who does so thru lessees, especially where, as here, the lessor directs the lessees? And if a farmer resided on his land,

did none of the work himself, hired all help, and kept a foreman to whom the farmer gave orders and by whom all orders were given to the servants, would the debtor be any less a "farmer"? And in just what respect does residence count? If the debtor who did all the work on his farm himself, did not live on it, but in some nearby village, would he be any less a farmer?

As we view it, residence of the debtor is of no consequence of itself. If he does not live on the farm, but in town, it may give rise to proof that he has a vocation other than farming; but that is all. So "personally engaged" does not necessarily mean that the debtor does all the work, or any work. He may be just as much a "farmer" if he gets the work done thru servants or lessees.

This last argument relates wholly, however, to the first half of the definition: is the petitioner "primarily *bona fide* personally engaged"? It has nothing to do with the second half. We confidently believe that petitioner comes under both alternatives.

It should be pointed out that Section 75 (r) originally defined a farmer as one personally primarily engaged *bona fide* in "farming operations" or the principal part of whose income came from "such operations." By an amendment effective May 15, 1935, the quoted words "farming operations" were changed to "in producing products of the soil."

For an excellent review of all the cases on the subject up to April 15, 1936 involving those before and after the amendment see: *Matter of Reidling* (D. C. Ohio) 33 American Bankruptcy Reports, New Series 773.

The case of *First National Bank vs. Beach, supra,* from the opinion in which by Mr. Justice Cardoza we have already quoted, was also before the Second Circuit Court of Appeals (*Matter of Beach,* 86 Fed. (2d) 88 decided November 9, 1936). Beach was there, as subsequently by the Supreme Court, held to be a farmer, though there by a divided Court. Mr. Justice Learned Hand, writing the majority opinion, gives some interesting observations on the construction involved here with reference to both branches of the definition:

> "In spite of the fact that he gave most of his time to working his farm, we think that Beach was not 'primarily . . . personally engaged' in farming. He would not have been so regarded before the amendment of Section 75, and we see no reason to impute another meaning to such nearly identical language as it contains. *Swift vs. Mobley,* 28 Fed. (2d) 610 (C. C. A. 5); *In re Spengler,* (D. C.) 238 Fed. 862; *In re McMurray,* (D. C.) 8 Fed. Supp. 4492; *In re Weis,* (D. C.) 10 Fed. Supp. 227. Again, it was also settled that a person who lived on income derived from a farm was not a farmer under Section 4 (b), as amended (11 U. S. C. A. Sec. 22 (b) *In re Glass,* 53 Fed. (2d) 844 Supp. (C. C. A.); *In re Matson,* (D. C.) 123 Fed. 743; *In re Driver,* (D. C.) 252 Fed. 956; *In re Brown,* (D. C.) 284 Fed. 899). Sec. 75 (r) as amended (11 U. S. C. A. Sec 203 (r)) certainly meant to broaden the class, by contrasting those 'personally *bona fide* engaged' in husbandry with those who merely drew their personal income from it. It seems to us either that 'personally' must mean 'without any assistance' or that the second clause includes those

who live by rents from the farm operations of tenants. We reject the first alternative; a man is no less a farmer because he hires laborers either regularly or sporadically; he is 'personally' engaged in farming, though being in possession, he rides his acres and superintends the manual labor of others. On the other hand, it is certainly a gross abuse of words to call that man a farmer, who merely lives upon the yields of farm lands; nor can we see that this is much bettered by confining the clause to leases in which the tenant pays in kind. Nevertheless, notwithstanding the violence done to ordinary uses, we can not escape the literal meaning of the words chosen. Such a result does not, moreover, violate the probabilities as much as one might at first blush suppose. The occasion for the legislation was the collapse of farm values. Following upon the depression, and indeed preceding it, there was a large class who had rented their farms to others; but who were as dependent upon the yield as though they worked the land themselves as they usually had done originally. These people were originally in the same class as those who actually farmed; it is not unreasonable to ascribe to Congress an intention to succor them with the rest. Mortgagees may, indeed, be outside the class, even though the interest be in fact paid out of the earnings of the mortgaged farm; we have not such a case before us. Nor need we hold that the lessor of a farm is within the clause, if the lessee pays the rent from other sources than his own farm. But when the Debtor's personal income in fact comes out of the land, we find it impossible to give reasonable effect to the language used unless we call him a farmer. No Circuit Court of Appeals has passed upon

the point; the only District Court opinion which does so is *In re Hilliker,* 9 Fed. Supp. (Judge Wm. P. James, California) 948. The judge there appears to have taken the other view, though it was not necessary to the decision; but we can not agree that the scope which he leaves to the clause, fills out the full measure of its meaning."

In considering this question, it must be borne in mind that we reserved the right to insist on the deposition of petitioner. There seems to be no authority with reference to the burden of proof. Respondent Bank's counsel conceded he had that burden. (Record, p. 41, just before Stipulation.) For all we know, petitioner may reside at times on a farm in England, and actually plow the fields and plant and harvest the crops there.

Respectfully submitted,

RAYMOND R. HAILS,
JOHN A. JORGENSON,
Counsel for Appellant.

Supplement on Restraining Order

At the time of the appeal here, the trial Court made its order preserving the status quo pending appeal. (Record, p. 43.)

Thereafter appellee made application to "clarify" said order, and pursuant thereto, the trial Court made its order (R., p. 48) permitting appellee to advertise the property for sale in the usual manner of trust deed foreclosures. However it was provided (R., p. 50) "no sale of the whole or any part of said property shall be made by said Security-First National Bank of Los Angeles . . . , or the Trustee named in said deeds of trust, pending the *determination* of the appeal in the above in the above-entitled matter, and the date of any proposed sale set forth in any advertisement made under the terms and provisions of this order shall be postponed from time to time so that no sale shall take place thereunder until after the *"determination* of said appeal."

The usual three months notice of default had been given at the time of the filing of the petitions herein. By reason of said modified order on the stay, the appellee advertised the property for sale for April 13, 1939. On that date the sale was postponed to May 18th, and on that date to June 8th. And so, we presume, it will continue to be postponed.

Section 75 (o) of the Bankruptcy Act provides:

> "Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be in-

stituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and *prior to the confirmation or other disposition of the composition or extension proposal by the court"* etc.

No "composition or extension proposal" has ever been submitted to the trial court. That was effectually prevented by the proceedings for dismissal. It is doubtful if the trial court had power under this section to permit the advertisement.

But however that may, or whatever may be the effect of a sale had contrary to the provisions of Section 75 (o), we sit, so far as the trial court's modified stay order is concerned, on the very verge of a precipice. In the event of an adverse decision of this Court, appellee may, on receiving a notice of the decision, feel that the appeal has been "determined." If the sale date is conveniently close to the day of such "determination," we may find that the sale has actually taken place without an opportunity to petition this court for rehearing, or seek a review in the Supreme Court.

Respectfully submitted,

RAYMOND R. HAILS,
JOHN A. JORGENSON,
Counsel for Appellant.